Union Insurance Malaysia Sdn Bhd v Chan You Young

HIGH COURT (JOHOR BAHRU) — CIVIL APPEAL NO (MT-1) 12–26 OF 1994
SYED AHMAD HELMY JC
25 APRIL 2003

Civil Procedure *— Costs — Taxation — Review — Getting-up fee — Whether deputy registrar considered principles in O 59 Appendix I Part X, para 1(2) of the Rules of the High Court 1980 — Whether this case involved new and novel issues of law — Whether this case required great skill and specialized knowledge of counsel — Whether this matter involved perusal and study of crucial documents — Whether this case highly important to respondent*

Civil Procedure *— Costs — Taxation — Review — Getting-up fee — Whether question of quantum in taxation was to be left to the registrar only — Whether registrar had made obvious error — Whether registrar exercised discretion capriciously or mischievously — Whether registrar had acted on a mistaken principle — Whether judge should interfere*

The respondent suffered injuries when the vehicle she was in was involved in an accident caused by the recklessness of the driver. The respondent was on her way to work at the material time. The vehicle was owned by the respondent's husband. Consequently, the respondent filed an action in the sessions court against her husband and the driver for damages for the injuries she sustained. The respondent obtained judgment against her husband in the sum of, inter alia, RM76,400 for special and general damages. Upon obtaining the said judgment, the respondent commenced enforcement proceedings against the appellant pursuant to the provisions of s 96 of the Road Transport Act 1987. The appellant was the insurance company that insured the respondent's husband's vehicle. The appellant defended the action. The insurance policy excluded passenger liability '... other than a passenger being carried by reason of or in pursuance of a contract of employment being carried in or upon, or entering or getting on to or alighting from any vehicle ...'. The issues raised by the respondent before the High Court were whether: (a) the appellant was liable to pay to the respondent the judgment sum pursuant to the insurance policy it issued to the respondent's husband ('the first issue'); and (b) the judgment and the enforcement of the judgment was invalid on the ground that the respondent had sued her husband for a tort committed by him and as such, was a prohibited and proscribed cause of action under s 9(2) of the Married Women's Ordinance 1957 ('the second issue'). The learned High Court Judge, Abdul Malik Ishak J, held in favour of the respondent. In respect of the first issue, the learned High Court judge chose not follow the interpretation given by the Privy Council in *Tan Keng Hong & Anor v New India Assurance Co Ltd* [1978] 1 MLJ 97, which construed the expression 'by reason of or in pursuance of a contract of employment' conjunctively and instead interpreted the said expression disjunctively. Accordingly, this construction meant

A that the expression 'by reason of a contract of employment' must be read disjunctively from the expression 'in pursuance of a contract of employment'. In respect of the second issue, the learned High Court judge held that that the respondent was not bringing a legal proceeding against her husband for a tort committed by him, but rather, under the principle of vicarious liability for a tort committed by
B the husband's authorized driver and that the respondent's legal action against her husband was an action brought to protect her property. This was the appellant's application for review of the taxed costs awarded by the learned deputy registrar in respect of the respondent's bill of costs relating to the item of getting-up under item 41 thereof. The appellant, save for item 41 on getting-up, had conceded to all
C items in the respondent's bill of costs. The bill came up for taxation before the learned deputy registrar, who after hearing counsel for the appellant and for the respondent on item 41, allowed the sum of RM90,000 for getting-up. Both appellant and respondent filed a summons for review of the sum awarded for getting-up. On 14 May
D 2002, the learned deputy registrar dismissed the appellant's application for review and allowed the respondent's application for review and enhanced the award for getting-up to RM200,000.

Held, dismissing the appellant's application:

E (1) Following the Privy Council's decision in *Tan Keng Hong & Anor v New India Assurance Co Ltd*, insurance companies liability for injuries sustained by a third party travelling to work in the insured's vehicle unless the third party had a contract of employment with the insured that required the former to travel to work in the latter's vehicle. In order for a third party to claim
F against the insurer, the insured must have a passenger liability policy in force. Hence, by refusing to follow the Privy Council decision, this case had indeed broken new ground and the novelty of the issue was self-evident. With the advent of this decision, a third party now had a right to bring a claim against an insurance
G company if the third party sustained any injury whilst travelling to work in an insured's vehicle regardless of whether the third party had a contract of employment with the insured that required the former to travel to work in the latter's vehicle. The decision in this case had effectively reversed a legal principle that had been accepted and applied in this country for the past 20 years and as
H such, this case involved complex and novel issues of law (see pp 496H–497C).

(2) Prior to this case, there were no reported Malaysian cases canvassing the second issue. Hence, it was evident that this was a new and novel issue (see p 497G–H).

I (3) Generally, a judge was not the person to decide on the question of quantum in taxation as this question was, by operation of law, left to the registrar and the judge cannot substitute his discretion in

place of the registrar's. As such, an appeal merely against the quantum awarded by the registrar must fail. A judge can only interfere with the registrar's decision if it can be clearly shown that the registrar had made an obvious error, or if he had exercised his discretion capriciously or mischievously, or if he had acted on a mistaken principle (see p 500C–E).

(4) In the instant case, it was clear that the deputy registrar considered the applicable factors of the skill and specialized knowledge required of counsel, the perusal and study of crucial documents and the importance of the subject matter to the respondent in arriving at his decision and the enhancement of the item of getting-up. The deputy registrar neither acted on any mistaken principle nor exercised his discretion capriciously or mischievously, but conversely, considered all relevant principles and facts to arrive at the quantum that he awarded (see pp 502D–E, 503A–B).

(5) The principles applicable in the process of taxation for a matter conducted in the High Court was enshrined in O 59 Appendix 1 Part X, para 1(2) of the Rules of the High Court 1980 ('the RHC') and not in the Subordinate Courts Rules 1980. The Subordinate Courts Rules cannot be applied for matters conducted in the High Court. The RHC gave the taxing officer a discretion when fixing costs for a matter, which was unlike the Subordinate Courts Rules which provided a fixed scale that must be followed by the registrar of the subordinate courts. The taxation of costs in the High Court did not corelate to the amount in dispute or the amount of damages awarded. On the other hand, the fixed scale provided for by the Subordinate Courts Rules, conversely, is directly proportional to the size of the claim (see pp 504H–I, 505B–D); *Ketua Pengarah Hasil Dalam Negeri v Damansara Jaya Sdn Bhd* [1999] 2 MLJ 374 and *Pang Kok v Leong Fock Hap & Anor* [1996] 4 MLJ 97 followed and *Canopee Investment Pte Ltd & Ors v Landmarks Holdings Bhd & Ors* [1990] 1 MLJ 292 not followed.

(6) A reading of the deputy registrar's ruling clearly and unequivocally showed that he had considered the principles laid down in O 59 Appendix I Part X, para 1(2) of the RHC. The learned deputy registrar had awarded a sum of RM200,000 as costs on account of the fact, inter alia, that this case involved a new and novel issue of law that had far-reaching implications for the insurance industry in Malaysia. He also gave due weight to the other factors that were at play in this case, namely: (a) the fact that this case required great skill and specialized knowledge of counsel; (b) this matter involved the perusal and study of crucial documents; and (c) this cause was highly important to the respondent (see pp 510E–F, 511F).

A **[Bahasa Malaysia summary**

Responden mengalami kecederaan semasa kenderaan yang dinaikinya terlibat dalam suatu kemalangan akibat kecuaian pemandu kenderaan tersebut. Responden sedang dalam perjalanan ke tempat kerjanya pada masa tersebut. Tuan punya kenderaan adalah suami responden.
B Seterusnya, responden telah memfailkan suatu tindakan dalam mahkamah sesyen terhadap suaminya serta pemandu bagi kecederaan yang dialaminya. Responden telah memperolehi penghakiman terhadap suaminya dalam jumlah, antara lain, RM76,400 bagi ganti rugi khas dan am. Setelah mendapatkan penghakiman tersebut,
C responden memulakan prosiding penguatkuasaan terhadap perayu dibawah peruntukan s 96 Akta Pengangkutan Jalan 1987. Perayu merupakan syarikat insuran yang menginsuranskan kenderaan suami responden. Perayu telah membela tindakan tersebut. Polisi insuran tidak meliputi liabiliti ke atas penumpang '... other than a passenger being carried by reason of or in pursuance of a contract of
D employment being carried in or upon, or entering or getting on to or alighting from any vehicle ...'. Isu-isu yang dibangkitkan oleh responden di Mahkamah Tinggi adalah sama ada: (a) perayu bertanggungjawab membayar kepada responden jumlah penghakiman mengikut polisi insuran yang dikeluarkan kepada suami responden ('isu pertama'); dan (b) penghakiman serta penguatkuasaan
E penghakiman adalah tidak sah memandangkan responden telah mendakwa suaminya bagi tort yang dilakukan ke atasnya dan oleh itu merupakan suatu tindakan yang dilarang dan diharamkan di bawah s 9(2) Ordinan Wanita Berkahwin 1957 ('isu kedua'). Hakim Mahkamah Tinggi yang arif, Abdul Malik Ishak H, telah memutuskan untuk responden. Dalam isu pertama, hakim Mahkamah Tinggi yang
F arif enggan mengikuti tafsiran yang diberikan oleh Majlis Privy dalam kes *Tan Keng Hong & Anor v New India Assurance Co Ltd* [1978] 1 MLJ 97, yang telah mentafsirkan pepatah 'by reason of or in pursuance of a contract of employment' secara berhubung malah telah mentafsirkan pepatah tersebut secara berasingan. Seterusnya, tafsiran
G ini membawa maksud bahawa pepatah 'by reason of a contract of employment' perlu ditafsir secara berasingan daripada pepatah 'in pursuance of a contract of employment'. Bagi isu kedua pula, hakim Mahkamah Tinggi yang arif memutuskan bahawa responden tidak membawa suatu tindakan undang-undang terhadap suaminya bagi tort yang dilakukan olehnya, tetapi, di bawah prinsip liabiliti vikarius
H bagi tort yang dilakukan oleh pemandu sah suaminya dan bahawa tindakan undang-undang responden terhadap suaminya merupakan suatu tindakan bagi melindungi harta benda responden. Ini merupakan permohonan perayu bagi kajian semula kos ditetapkan yang diawardkan oleh timbalan pendaftar yang arif bagi bil kos responden bagi perkara penyediaan guaman di bawah butiran 41 bil
I tersebut. Perayu, selain daripada butiran 41 bagi penyediaan guaman, telah mengakui segala butiran dalam bil kos responden. Bil kos tersebut telah dibawa untuk ditetapkan di hadapan timbalan

pendaftar yang telah, selepas mendengar peguamcara bagi perayu dan responden di atas butiran 41, membenarkan jumlah RM90,000 bagi penyediaan guaman. Kedua-dua perayu dan responden telah memfailkan saman bagi kajian semula jumlah yang diawardkan bagi penyediaan guaman. Pada 14 Mei 2002, timbalan pendaftar yang arif telah menolak permohonan perayu bagi kajian semula dan membenarkan permohonan responden bagi kajian semula dan menambahkan nilai award bagi penyediaan guaman kepada RM200,000.

Diputuskan, menolak permohonan perayu:

(1) Berlanjutan keputusan Majlis Privy dalam kes *Tan Keng Hong & Anor v New India Assurance Co Ltd*, syarikat-syarikat insuran telah menafikan tanggungjawab bagi kecederaan yang dialami pihak ketiga dalam perjalanan ke tempat kerja dalam kenderaan pihak yang diinsuranskan melainkan pihak ketiga mempunyai kontrak pekerjaan dengan pihak yang diinsuranskan yang memerlukan pihak ketiga ke tempat kerja dalam kenderaan pihak yang diinsuranskan. Bagi membolehkan pihak ketiga menuntut terhadap pihak insuran, pihak yang diinsuranskan perlu mempunyai polisi liabiliti penumpang yang berkuatkuasa. Jadi, dengan enggan mengikut keputusan kes Majlis Privy tersebut, kes ini sememangnya telah meneroka jalan baru dan kebaharuan isu tersebut adalah ternyata. Dengan wujudnya keputusan ini, kini pihak ketiga mempunyai hak membawa tuntutan terhadap syarikat insuran jika pihak ketiga tersebut mengalami sebarang kecederaan semasa perjalanan ke tempat kerja dalam kenderaan pihak yang diinsuranskan tidak kira sama ada pihak ketiga mempunyai suatu kontrak pekerjaan dengan pihak yang diinsuranskan tersebut yang memerlukan pihak ketiga membuat perjalanan ke tempat kerjanya dalam kenderaan pihak yang diinsuranskan. Keputusan dalam kes ini telah mengakaskan suatu prinsip undang-undang yang telah diterima dan dipakaikan dalam negara ini selama 20 tahun dan memandangkan sedemikian, kes ini melibatkan isu-isu undang-undang yang kompleks dan baharu (lihat ms 496H–497C).

(2) Sebelum kes ini tiada sebarang keputusan yang dilaporkan di negara ini yang melibatkan isu kedua. Jadi adalah ternyata bahawa ini merupakan isu yang baru dan baharu (lihat ms 497G–H).

(3) Biasanya, seorang hakim bukanlah orang yang memutuskan persoalan kuantum dalam penetapan memandangkan persoalan tersebut, dibawah undang-undang, terletak pada pendaftar dan hakim tidak dapat menggantikan budibicara pendaftar dengan budibicaranya. Memandangkan sedemikian, suatu rayuan semata-mata terhadap kuantum yang diawardkan pendaftar semestinya gagal. Seorang hakim hanya dapat campur tangan dalam keputusan pendaftar sekiranya dapat ditunjukkan dengan

jelas bahawa pendaftar telah membuat kesilapan yang ketara, atau sekiranya beliau telah menggunakan budi bicaranya secara tak tentu hala atau dengan mudarat, atau jika beliau telah bertindak di atas suatu prinsip yang salah (lihat ms 500C–E).

(4) Dalam kes ini, adalah jelas bahawa timbalan pendaftar telah menimbangkan faktor-faktor terpakai mengenai kemahiran dan pengetahuan khas yang diperlukan peguam, pembacaan serta penelitian dokumen penting dan kepentingan tindakan bagi responden dalam membuat keputusannya dan penambahan butiran penyediaan guaman tersebut. Timbalan pendaftar tidak bertindak di atas prinsip salah, atau mengunakan budi bicaranya secara tak tentu hala atau dengan mudarat, tetapi sebaliknya, telah menimbangkan semua prinsip dan fakta yang relevan bagi mendapat kuantum yang diawardkan itu (lihat ms 502D–E, 503A–B).

(5) Prinsip-prinsip yang terpakai dalam proses penetapan suatu perkara dalam Mahkamah Tinggi adalah seperti diperuntukkan dalam A 59 Lampiran 1 Bahagian X perenggan (2) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan bukannya dalam Kaedah-Kaedah Mahkamah Rendah 1980. Kaedah-Kaedah Mahkamah Rendah tidak terpakai bagi perkara yang dijalankan dalam Mahkamah Tinggi. KMT memberikan pegawai taksiran budibicara semasa menetapkan kos dalam suatu perkara, tidak seperti Kaedah-Kaedah Mahkamah Rendah yang memperuntukkan skala yang tertentu yang perlu diikuti pendaftar mahkamah rendah. Penetapan kos dalam Mahkamah Tinggi tidak berkait dengan jumlah yang dituntut atau jumlah ganti rugi yang diawardkan. Sebaliknya, skala yang diperuntukkan dalam Kaedah-Kaedah Mahkamah Rendah adalah berkadar secara terus kepada jumlah tuntutan (lihat ms 504H–I, 505B–D); *Ketua Pengarah Hasil Dalam Negeri v Damansara Jaya Sdn Bhd* [1999] 2 MLJ 374 dan *Pang Kok v Leong Fock Hap & Anor* [1996] 4 MLJ 97 diikut dan *Canopee Investment Pte Ltd & Ors v Landmarks Holdings Bhd & Ors* [1990] 1 MLJ 292 tidak diikut.

(6) Suatu pembacaan arahan timbalan pendaftar jelas nyata menunjukkan bahawa beliau telah menimbangkan prinsip-prinsip yang diberikan dalam A 59 Lampiran I Bahagian X, perenggan 1(2) KMT. Timbalan pendaftar yang arif telah mengawardkan sejumlah RM200,000 sebagai kos memandangkan fakta, antara lain, bahawa kes ini melibatkan isu undang-undang yang baru dan baharu yang membawa kepada implikasi yang meluas bagi industri insuran Malaysia. Beliau juga telah menimbangkan sewajarnya faktor-faktor lain dalam kes ini, iaitu: (a) fakta bahawa kes ini memerlukan kemahiran dan pengetahuan khusus peguam; (b) perkara ini melibatkan pembacaan dan penelitian dokumen penting; dan (c) tindakan ini amat penting bagi responden (lihat ms 510E–F, 511F).

Notes

For cases on taxation of costs, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 1823–1878.

Cases referred to

Alsop v Lord Oxford (1833) 1 My & K 564 (refd)
Bar Council v Datuk V Kanagalingam [2000] 3 CLJ 697 (refd)
Canopee Investment Pte Ltd & Ors v Landmarks Holdings Bhd & Ors [1990] 1 MLJ 292 (not folld)
Chan Kok Choon JP v MBf Finance Bhd [2001] 1 MLJ 5 (refd)
Chan Kum Fook & Ors v The Welfare Insurance Co Ltd [1975] 2 MLJ 184 (refd)
China Insurance Co Ltd v Teh Lain Lee & Anor [1977] 1 MLJ 1 (refd)
Cornish v The Accident Insurance Company, Limited (1889) 23 QBD 453 (refd)
Curtis v Wilcox [1948] 2 All ER 573 (refd)
Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors and another application [1999] 1 MLJ 257 (refd)
English v Western [1940] 2 KB 156 (refd)
Estate of Ogilvie, In the (1910) P 243 (refd)
Gooi Hock Seng v Chuah Guat Khim, Pemegang harta pesaka bagi estet Chuah Teow Hock, simati [2000] 3 AMR 3683 (refd)
Izzard v Universal Insurance Company, Limited [1937] AC 773 (refd)
JP Finance (M) Bhd v Tanswan Brothers Enterprise Sdn Bhd & Ors [1994] 1 MLJ 47 (refd)
Kandasami v Mohamed Mustafa [1983] 2 MLJ 85 (refd)
Ketua Pengarah Hasil Dalam Negeri v Damansara Jaya Sdn Bhd [1999] 2 MLJ 374 (folld)
Lim Eng Yew v United Oriental Assurance Sdn Bhd [1989] 1 MLJ 454 (refd)
MC Corbett v Ipoh Tin Dredging Ltd [1936] MLJ 222 (refd)
Malaysia National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud [1979] 2 MLJ 29 (refd)
Mohamed Mustafa v Kandasami [1979] 2 MLJ 109 (refd)
Pang Hon Chin v Nahar Singh [1986] 2 MLJ 145 (refd)
Pang Kok v Leong Fock Hap & Anor [1996] 4 MLJ 97 (folld)
Perry and another v Lord Chancellor The Times, 26 May 1994, Transcript (refd)
Phua Lay Chay v Chai Kuan Way [1988] 3 MLJ xxv (refd)
Property and Reversionary Investment Corporation Ltd v Secretary of State for the Environment [1975] 2 All ER 436 (refd)
Richards v Cox [1943] 1 KB 139 (refd)
Sadiah Ismail v Ong Suan & Anor [1999] 5 CLJ 250 (refd)
Starlite Ceramic Industry Ltd v Hiap Huat Pottery [1973] 1 MLJ 146 (refd)

Tan Keng Hong & Anor v New India Assurance Co Ltd [1978] 1 MLJ 97 (refd)
Tuan Hj Ishak bin Ismail v Leong Hup Holdings Bhd & other actions [1997] 1 MLJ 623 (refd)
Union Insurance Malaysia Sdn Bhd v Chan You Young [1996] 2 MLJ 118 (refd)
United Malayan Banking Corp v Syarikat Perumahan Luas Sdn Bhd [1991] 3 MLJ 181 (refd)
United Malayan Banking Corporation Berhad v Indah Sejati Sdn Bhd [1992] 1 AMR 41 (refd)
United Oriental Assurance Sdn Bhd v Penang Medical Centre Sdn Bhd [1999] 2 MLJ 542 (refd)
Vincent Cheng Kim Chuan v The Minister for Home Affairs & 2 Ors [1992] 2 CLJ 945 (refd)
Watson v Phipps (1985) 60 ALJR 1 (refd)
Wong Kon Poh v New India Assurance Co Ltd [1970] 2 MLJ 287 (refd)

Legislation referred to

Married Women's Ordinance 1957 s 9, (1), (2)
Road Transport Act 1987 s 96
Rules of the High Court 1980 O 18 r 19(1), (a), (b), (c), O 59, r 36, Appendix 1 Part X, para 1(2), (a), (b), (c), (e)
Subordinate Courts Rules 1980 O 48 r 12

Appeal from: Saman No 53-218 Tahun 1989 (Sessions Court, Johor Bahru)

RA Kumar (*Nijar, Kumar, Netto & Partners*) for the appellant.
Clarence Edwin (*Zaid Ibrahim & Co*) for the respondent.

Syed Ahmad Helmy JC: This is the appellant's application for review of the taxed costs awarded by the learned deputy registrar in respect of the respondent's bill of costs dated 20 December 1999 relating to the item of getting up under item 41 thereof.

The respondent had earlier filed her notice for taxation of costs on 23 December 1999 together with her bill of costs in encl 25. The appellant, save for item 41 on getting up, conceded to all items in the respondent's bill of costs. The bill came up for taxation before the learned senior assistant registrar, who after hearing counsel for the appellant and for the respondent on item 41, allowed the sum of RM90,000 for getting up.

Both the appellant and respondent filed a summons for review of the sum awarded for getting up; the appellant's summons and grounds therefor is found in encl 32, while the respondent's summons and grounds for review is found in encl 35.

On 14 May 2002, the learned deputy registrar, after hearing counsel's submissions on encll 32 and 35, dismissed the appellant's application for review and allowed the respondent's application for review and enhanced the award for getting up to RM200,000.

To appreciate the quantum of the award made by the learned deputy registrar it is only appropriate at this juncture to relate the subject matter upon which the bill of costs was founded.

FACTS OF THE CASE

The respondent at the material time was a passenger in a vehicle owned by her husband and was on her way to work at the central market in Jalan Wong Ah Fook, Johor Bahru. The said vehicle at the material time was being driven by her son, the respondent's husband's authorized driver.

On the journey to the respondent's place of work, the said vehicle was involved in an accident caused by the recklessness of the driver (the respondent's son). The respondent suffered injuries as a result of the said accident and consequently the respondent filed Civil Action No 53–218–1989–1 in the Sessions Court at Johor Bahru against her husband and her son, as the authorized driver, for damages for the injuries she sustained.

The respondent obtained judgment against her husband in the said civil action in the sum of RM76,400 for special and general damages and RM6,875 and interest thereon. Upon obtaining the said judgment, the respondent commenced enforcement proceedings against the appellant vide Civil Action No 52–804–1991–3 pursuant to the provisions of s 96 of the Road Transport Act 1987. The appellant is the insurance company that insured the respondent's husband's vehicle.

The appellant defended the action. The parties agreed to the dispensation of witnesses and proceeded with submission based on a set of agreed facts and issues which agreed facts are as follows:

(a) the respondent and her son are members of the insured's household, that is the respondent's husband;

(b) the accident that formed the basis of Civil Action No 53–218–1989–1 occurred on 4 June 1988;

(c) at the time the accident occurred, the respondent was seated in the front passenger seat of the vehicle beside her son who was driving the vehicle;

(d) the respondent's son was authorized and was driving the vehicle with his father's consent, that is the insurance policy holder's consent. Consequently, the son was the authorized driver at the material time;

(e) at the time the accident occurred, the respondent was on her way to her place of work, namely, a stall in the Central Market, Jalan Wong Ah Fook, Johor Bahru;

(f) the respondent was paid a monthly wage of RM450 by her employer.

The issues that were placed before the trial judge for the court's consideration was two fold namely:

(1) whether the insurance company was liable under the insurance policy it issued to the respondent's husband to pay to the respondent the judgment sum obtained on 21 November 1991, particularly under cl 1(a) s II and cl 9 Endorsement D; and

(2) whether the judgment in Civil Action No 53–218–1989–1, the enforcement of which was done via this Civil Action No 52–804–1991–3, is invalid on the ground that the plaintiff (respondent) in Civil Action No 53–218–1989–1 had sued her husband for a tort committed by him and as such, was a prohibited and proscribed cause of action under s 9(2) of the Married Women Ordinance 1957.

I shall now address my attention to the two issues raised.

THE FIRST ISSUE

The first issue stated above involved the interpretation of the insurance policy the appellant issued to its policyholder, particularly cl 1(a) s II and cl 9 Endorsement D thereof, cl 1(a) s II and cl 9 Endorsement D of the insurance policy in this case respectively provide:

> 1 *The Company will* subject to the limits of Liability *indemnify the insured in the event of accident arising out of the use of the Motor Vehicle against all sums* including claimant's costs and expenses *which the insured shall become legally liable to pay in respect of*:
>
> (a) death of or *bodily injury to any person* except where such death or injury arises out of and in the course of the employment of such person by the insured and *excluding liability to any person being a member of the insured's household who is a passenger in the Motor Vehicle unless such person is being carried by reason of or in pursuance of a contract of employment.*
>
> 9 The due observance and fulfilment of the Terms of this Policy in so far as they relate to anything to be done or not to be done by the insured and the truth of the statements and answers in the proposal shall be conditions precedent to any liability of the Company to make any payment under this Policy.
>
> *Endorsements*
>
> The following Endorsements only apply to this Policy when specifically mentioned in the Schedule and are subject otherwise to the Terms and Conditions of this Policy.
>
> D Exclusion of passenger liability
>
> Nothwithstanding anything contained herein to the contrary, it is hereby understood and agreed that the Company shall not be liable in respect of death of or bodily injury to any person (*other than a passenger being carried by reason of or in pursuance of a contract of employment*) being carried in or upon, or entering or getting on to or alighting from any vehicle in respect of which indemnity is granted under this Policy at the time of the occurrence of the event out of which any claim arises. (Emphasis added.)

By reason of the clauses aforesaid the crucial phraseology for interpretation was 'a member of the insured's household who is a passenger ... being carried by reason of or in pursuance of a contract of employment'. In relation to the interpretation of the said phraseology, learned counsel for the appellant submitted that although a member of the insured's household may travel in the insured's vehicle, the insurance policy does not give

coverage or protection to the passenger and consequently, in the event of an accident, the said passenger would not be covered by the insurance policy and the insurance company need not indemnify the policyholder for injuries sustained by the passenger. The learned trial judge reproduced this submission at pp 8–9 of the grounds of judgment where it is stated:

> Mr RA Kumar for the insurance company argued that the wife falls under the category of persons to whom the insurance company under the policy will not have to indemnify for the negligence of the son as the authorized driver of the insured (husband). It was said that the coverage under the policy did not extend to her.
>
> Put in nutshell, Mr RA Kumar argued that though family members can travel in the motorcar of the husband during the subsistence of the policy there was no passenger liability cover and, consequently, in the event of an accident that passenger (in this case, the wife) will not be covered by the policy and the insurance company is not bound under the policy to indemnify the husband as the policy holder. It is Mr RA Kumar's contention that the insurance company is not obliged under the policy to satisfy the judgment in Civil Action No 53–218 of 1989–1.

The respondent's counsel, on the other hand, submitted that in light of the fact that the respondent's husband had taken an insurance policy, the insurance company was required to satisfy the husband's liability as stipulated by s 96 of the Road Transport Act 1987. This submission can be found at pp 6–7 of the grounds of judgment where the learned judge states:

> Mr Philip Nainan for the wife argued that since the husband was insured by the insurance company then the latter must satisfy any liability incurred by the husband under the policy as provided for under s 96 of the RTA [Road Transport Act 1987] which must necessarily include, so say Mr Philip Nainan, the son who was the driver of the motorcar and who drove that motorcar as an authorized driver.

In addressing the issue of the interpretation of cl 1(a) s II and cl 9 Endorsement D of the insurance policy, the respondent raised six minor issues for the judge to consider. Those issues were:

(a) that the respondent-wife is a third party for the purposes of the insurance policy;

(b) that the respondent-wife did not suffer injuries in the course of employment with her son;

(c) that the phrase 'being a member of the insured's household' includes the spouse of a policyholder;

(d) that the respondent-wife was a passenger in the vehicle who at the material time was on her way to work. Therefore, the phrase 'being carried by reason of or in pursuance of a contract of employment' includes the respondent because she was in the vehicle because of her contract of employment;

(e) the word 'or' in the phrase 'being carried by reason of or in pursuance of a contract of employment' should be read disjunctively and not conjunctively; and

(f) the contra proferentum rule applies in this case in the event there is any ambiguity regarding the scope and coverage of the insurance policy.

Though from the notes of evidence there is the respondents' concession that the issue of whether the plaintiff was a member of the insured's household was not relevant in view of Endorsement D nevertheless all the aforesaid issues were considered by the learned trial judge and were dealt with in pp 13–38 of his grounds of judgment which appears on pp 13–38 of the respondent's bundle of authorities. The authorities that were referred to in relation to these issues were:

(1) *Richards v Cox* [1943] 1 KB 139;

(2) *Lim Eng Yew v United Oriental Assurance Sdn Bhd* [1989] 1 MLJ 454;

(3) *Chan Kum Fook & Ors v The Welfare Insurance Co Ltd* [1975] 2 MLJ 184;

(4) *China Insurance Co Ltd v Teh Lain Lee & Anor*[1977] 1 MLJ 1;

(5) *Mohamed Mustafa v Kandasami* [1979] 2 MLJ 109;

(6) *Kandasami v Mohamed Mustafa* [1983] 2 MLJ 85;

(7) *Watson v Phipps* (1985) 60 ALJR 1;

(8) *Cornish v The Accident Insurance Company, Limited* (1889) 23 QBD 453;

(9) *English v Western* [1940] 2 KB 156;

(10) *Malaysia National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud* [1979] 2 MLJ 29;

(11) *Central Lorry Service Co Sdn Bhd v The American Insurance Co* [1981] 2 MLJ 40;

(12) *Izzard v Universal Insurance Company, Limited* [1937] AC 773;

(13) *Wong Kon Poh v New India Assurance Co Ltd* [1970] 2 MLJ 287;

(14) *The Pocket Oxford Dictionary;*

(15) *The Britannica World Language Dictionary.*

The question thus arises whether the first issue herein was one that was complex, difficult and novel. On this score it is pertinent to note that the learned judge Dato' Abdul Malik Ishak J in his inimitable style expressly stated in his judgment (*Union Insurance Malaysia Sdn Bhd v Chan You Young* [1996] 2 MLJ 118, at p 126):

> I am told that *I am breaking new ground* as my decision, if I am with the wife, would prevent the insurance company from insisting that a passenger liability cover be taken to cover the wife who is being carried in the husband's (policyholder's) motorcar which was driven by her son as the authorized driver even though the policy is sufficiently worded to cover such an exigency'. (Emphasis added.)

The appellant contends that the judge's remark that 'I am told that I am breaking new ground' cannot by itself be reflective of the complexity,

difficulty or novelness of the issue as the interpretation of the expression 'by reason of or in pursuance of a contract of employment' had already been considered and construed to be read conjunctively and not disjunctively by the Privy Council in the case of *Tan Keng Hong & Anor v New India Assurance Co Ltd* [1978] 1 MLJ 97. Lord Salmon in delivering the opinion of the board, said at p 98:

> In their Lordships' view the words 'by reason of his contract of service' *must be read in conjunction* with the words 'in pursuance of,' and, properly construed, *mean because the contract of employment expressly or implied requires the employee or gives him the right to travel as a passenger in the motor vehicle concerned.* (Emphasis added.)

The learned High Court judge in not following the above interpretation given by the Privy Council proceeded to interpret the phrase 'being carried by reason of or in pursuance of a contract of employment' disjunctively as appears at p 35 of his grounds of judgment which reads as follows:

> *Another approach to be adopted in construing cl 9 Endorsement D is to consider the words in brackets disjunctively. This construction would mean that the expressions 'by reason of a contract of employment' must be read disjunctively from the expressions 'in pursuance of a contract of employment' because of the presence of the word 'or' in between those expressions. To say that those expressions should be read conjunctively is doing violence to the word 'or' inserted therein. When read disjunctively, as I so hold, then by reason of a contract of employment with Tharmarajoo, the wife could obtain satisfaction in regard to Civil Action No 53–218 of 1989–1 against the insurance company.* (Emphasis added.)

The learned judge proceeded to state at p 37 of the grounds of judgment:

> *The Pocket Oxford Dictionary defines the word 'or' as 'introducing alternatives'. The Britannica World Language Dictionary defines 'or' as 'the alternative expressed by or is emphasised by prefixing to the first member, or adding after the last'. Put in another way, when there are several possibilities 'or' is placed before the last one. This means that when the word 'or' is used there is a choice to be made, between one or the other and not to accept both of them. Thus, the word 'or' appearing in the bracketed words of cl 9 Endorsement D reflects the intention of the insurance company to construe the word 'or' as disjunctive and not conjunctive.* (Emphasis added.)

Thus from the judgment aforesaid it becomes abundantly clear that had the conjunctive interpretation of the phrase been accepted and applied in this case, the respondent-wife would not have succeeded in her claim against the appellant insurance company. This is simply because the respondent's contract of employment with her employer (Tharmarajoo) neither expressly nor impliedly required or authorized the respondent-wife to travel as a passenger in her husband's vehicle.

It should be emphasized that prior to the decision herein as laid down by *Tan Keng Hong & Anor* insurance companies denied liability for injuries sustained by a third party travelling to work in the insured's vehicle save and unless the third party had a contract of employment with the insured that required the former to travel to work in the latter's vehicle. In order for a third party to claim against the insurer, the insured must have a passenger

liability policy in force. The decision in *Tan Keng Hong & Anor* had been accepted and applied in Malaysia as the correct legal position for some 20 years preceding this case.

Hence by refusing to follow the Privy Council decision this case in my considered view has indeed broken new ground and the novelty of the issue becomes self evident.

With the advent of this decision, a third party now has a right to bring a claim against an insurance company if the third party sustains any injury whilst travelling to work in an insured's vehicle regardless whether the third party had a contract of employment with the insured that required the former to travel to work in the latter's vehicle. The decision in this case has effectively reversed a legal principle that has been accepted and applied in this country for the past 20 years and as such, it is my conclusion that it is complex and involves novel issues of law.

THE SECOND ISSUE

The second issue is the inter-spouse issue emanating from s 9(2) of the Married Women Ordinance 1957. That section prohibits a wife from bringing legal proceedings against her husband for a tort unless it is for the protection of her property. The issue was considered by the learned judge at pp 38–48 of his grounds of judgment which for purposes of this decision merits no reproduction save that the decision adverted to and addressed the two corollary issues raised by the respondent namely:

(1) that the respondent was not bringing a legal proceedings against her husband for a tort committed by him, but rather, under the principle of vicarious liability for a tort committed by the husband's authorized driver; and

(2) the respondent's legal action against her husband was an action brought to protect her property, and that the term 'property' by definition includes a chose in action.

The authorities referred to in support of these issues and addressed by the learned judge were:

(1) ss 9(1) and 9(2) of the Married Women Ordinance 1957;

(2) *Curtis v Wilcox* [1948] 2 All ER 573.

I must stress that the inter-spouse issue had never been raised in Malaysia (and this is conceded to by the appellant) and there were no local cases reported in any Malaysian law journals where this issue had been canvassed prior to this case. Hence the conclusion that this inter-spouse issue embodies a new and novel issue is self evident.

The novelty of the question raised having been established and before determining the applicable principles as laid out in O 59, Appendix 1 Part X, para 1(2) of the Rules of the High Court 1980 ('RHC') it is appropriate to relate the law governing review by a judge.

The law governing a review by a judge

The starting point would be O 59 r 36 of the RHC which reads as follows:

> (1) Any party who is dissatisfied with the decision of the Registrar to allow or to disallow any item in whole or in part on review under rule 34 or 35, or with the amount allowed in respect of any item by the Registrar on any such review, may apply to a Judge for an order to review the taxation as to that item or part of an item, if, but only if, one of the parties to the proceedings before the Registrar requested the Registrar in accordance with rule 35(3) to state the reasons for his decision in respect of that item or part on the review.
>
> (2) An application under this rule for review of the Registrar's decision in respect of any item may be made at any time within 14 days, or such longer time as the Registrar at the time when he signs the certificate or the Court at any time, may allow.
>
> (3) An application under this rule shall be made by summons and shall, except where the Judge thinks fit to adjourn into Court, be heard in Chambers.
>
> (4) Unless the Judge otherwise directs, no further evidence shall be received on the hearing of an application under this rule, and no ground of objection shall be raised which was not raised on the review by the Registrar but, save as aforesaid, on the hearing of any such application the Judge may exercise all such powers and discretion as are vested in the Registrar in relation to the subject matter of the application.
>
> (5) On an application under this rule the Judge may make such order as the circumstances require, and in particular may order the Registrar's certificate to be amended or, except where thedispute as to the item under review is as to amount only, order the item to be remitted to the Registrar for taxation.
>
> (6) In this rule 'Judge' means a Judge in person.

Order 59 r 36 of the RHC explicitly provides that any party who is dissatisfied with the decision of the review of the registrar may apply to the judge for an order to review the taxation.

The operative provision in relation to a judge's power of review in sub-r 4 thereof the operative words of which are:

> ... on the hearing of any such application the Judge may exercise all such powers and discretion as are vested in the Registrar in relation to the subject matter of the application.

The appellant contends that by reason of the operative words aforesaid the provision confers powers on the judge which are co-extensive with that of the taxing officer and hence I have the authority to review the discretion of and the quantum awarded by the learned deputy registrar.

To ascertain the validity or otherwise of appellant's contention it is necessary to delve into and appraise the applicable case law authorities.

For this exercise an appraisal of the principle of the four cases alluded to by the parties herein namely *Alsop v Lord Oxford* (1833) 1 My & K 564; *In the Estate of Ogilvie* (1910) P 243; *MC Corbett v Ipoh Tin Dredging Ltd*

A [1936] MLJ 222 and *Chan Kok Choon JP v MBf Finance Bhd* [2001] 1 MLJ 5 would be embarked upon.

In the case of *Alsop v Lord Oxford* which was quoted in *In the Estate of Ogilvie*, Cozens-Hardy MR said:

> B It is of extreme importance that there should be no doubt as to the general rule on this subject. In 1833, in *Alsop v Lord Oxford* [(1833) 1 My & K 564], Sir John Leach MR said: 'Generally speaking, the decision of the Master on taxation is final: he is the sole judge of the fact, whether the business has been done, and of the proper charge to be made for it; and it is further his duty to inquire whether the business was required to be done; for, if the solicitor negligently or ignorantly takes any unnecessary proceedings, it is the duty of C the Master to protect the client from any charge in respect of such proceedings. The court will only interfere where the Master acts upon some mistaken principle'. Twenty years afterwards, in 1854, in *In re Catlin* [(1854) 18 Beav 508)] Sir John Romilly MR said: 'It is admitted, on both sides, that this court can only be called upon to determine on the propriety of allowing or disallowing items which involve some principle, and not where a question D only of quantum arises'. I should be very sorry if any doubt were cast on that, for I can scarcely imagine a tribunal more unfit than a judge of the High Court to deal with questions of quantum on the taxation of costs. The taxing Master is the person whose duty it is to decide questions of quantum, and it is not right for the judge to interfere in such a matter. If a question of principle arises, no doubt the court ought to interfere and cons er and if necessary correct the view taken by the taxing Master. These objections 5, 7, and 8 are all solely on E questions of quantum, and the registrar states in his answers to the objections that he has considered the matter and fixed a fee after consideration of the circumstances, and I think it would be wrong for us to reverse that decision, there being no question of principle involved. (Emphasis added.)

These principles have been accepted and applied in Malaysia as early as in F 1934, in *MC Corbett v Ipoh Tin Dredging Ltd* where Aitken J held at p 223:

> It is at the request of both Mr Williams and Mr Rix that this written ruling has been given, since I understood from them that the question raised by this appeal is of great interest and importance to the legal profession throughout Malaya. I have therefore decided to hazard a few further remarks in G explanation of my rejection of the plaintiff appellant's appeal. Had I come to the conclusion that the assistant registrar was merely following Practice Note No 5 of 1933 in making the disallowance that he did, I should have ordered him to disregard its somewhat imperative advice and exercise his own discretion instead. Had I come to the conclusion that he had made any obvious mistake, or had exercised his discretion capriciously or mischievously, I should have directed him as to the proper limits within which, in my opinion, H his discretion should be exercised. But none of these possibilities was established before me, and I am clearly of opinion that sub-r 71 of r 4 of 1932 does not allow me, on appeal, to substitute my discretion for that of the assistant registrar. To my mind the principle which should guide registrars and assistant registrars in taxing fees paid to eminent counsel who cannot, or will not appear in court without special remuneration is this:
>
> I Only so much should be allowed as would be regarded by a competent local practitioner as an adequate reward for his services as an advocate in the particular case under consideration.

> Opinions on such point may differ, but it is the opinion of the registrar (or assistant registrar) that the law provides shall count unless, as I have said before, he can be shown to have made some obvious error, or to have exercised his discretion in that regard capriciously or mischievously, or simply to have followed someone else's advice or instructions and not to have exercised any discretion at all. (Emphasis added.)

In another case which I came across, namely *Starlite Ceramic Industry Ltd v Hiap Huat Pottery* [1973] 1 MLJ 146, it was emphasized that the court will not interfere with the decision of the taxing registrar upon a mere question of quantum if the taxing registrar has exercised his discretion after consideration of all the circumstances and if no question of principle arises.

From the aforesaid cases, the principles devolved are patently clear in that:

(a) generally, a judge is not the person to decide on the question of quantum in taxation;

(b) the question of quantum is, by operation of law, left to the registrar and the judge cannot substitute his discretion in place of the registrar's;

(c) an appeal merely against the quantum awarded by the registrar must fail;

(d) a judge can only interfere with the registrar's decision if it can be clearly shown that the registrar made an obvious error, or if he exercised his discretion capriciously or mischievously, of if he acted on a mistaken principle.

The intrusion by the judge on the three grounds of obvious error, exercising discretion capriciously or mischievously or acting on mistaken principle came up for endorsement by the Court of Appeal in *Chan Kok Choon JP* where Shaik Daud JCA stated, at pp 7–8:

> In *Lloyds Bank plc v Ang Cheng Ho Quarry & Ors* [1993] 1 MLJ 127, Chong Siew Fai J (as he was then) held that generally speaking the discretion of the taxing officer on quantum will not be interfered with. In the present appeal we are of the view that the learned judge committed this grave error when he treated the review as an appeal. ... *For the learned judge to interfere there must be some error of principle or some other material error.* We can find no such errors in this appeal. The learned judge, therefore, should not have disturbed the finding of the registrar. ... *We are of the view that the learned judge fell into error when he relied on the decision in JP Finance (M) Bhd v Tanswan Brothers Enterprise Sdn Bhd & Ors [1994] 1 MLJ 47 in deference to the guidelines provided by O 59. That decision ought not to be applied ...* . (Emphasis added.)

It is evident that these standards are exacting and the onus is on the appellant herein to prove that the learned deputy registrar fell into one of the exceptions as laid out in para (d) above. To fully appreciate the same the written ruling of the learned deputy registrar is reproduced hereunder:

RULING

> This is a ruling in the review of taxation in the case of MT1–12–26–94. In the previous taxation, the learned SAR had taxed the amount of RM90,000 for getting up fees of the respondent/plaintiff.

A This review today is upon the application of both the plaintiff and defendant. In my perusal of the notes of proceedings and the judgment of Yang Arif the Honourable Lordship of High Court 1, I had observed that:

(i) this case had introduced novelty ie a new principle or area of law in as far as insurance law is concerned.

B (ii) I had also perused through the records/notes of proceedings in the earlier appeal before the High Court. I had not failed to notice that extension and comprehensive submissions had been presented by the learned counsel for the plaintiff.

And it has not escaped my attention that the learned counsel had correctly implored on the areas of law in regards to cl 1 (a) and s II and cl 9 of the C insurance policy.

In this regards, I had the benefit of reading *Izzard*'s case authority, a useful authority from England, which is the decision of the House of Lords. The legal precedent set forth in *Izzard*'s case is that passengers other than the insured party may be indemnified by the insurance company so long as the vehicle they were traveling are driven by the authorized driver of the D insured.

To the best of my knowledge, prior to this case, such protection coverage was never afforded by any insurance company.

In my perusal of the submissions and a cursory of the notes of proceedings at the stage of the appeal proper, I had also noted that the learned counsel for the plaintiff had argued at great length and had also produced E various authorities before the learned honourable Lordship.

Therefore, it goes to show that detailed preparations were made before the appeal and during the stage of submission.

I had inquired from both learned counsel of the plaintiff/respondent and defendant/appellant on the final status of this suit. And both had diligently F informed me that subsequent to the appeal already disposed of in the Court of Appeal, no further appeals had been lodged. Therefore the decision of the Court of Appeal in 1999 stands.

A new development/area of law expounded by virtue of our case today seems to be the extension of the principle of law in the inter-spouse issue.

In our present case today, the plaintiff is the wife of the insured. She had G commenced proceedings against the insurance company — the defendant for injuries sustained in an accident in a vehicle driven by a driver authorized by her husband.

It was held that she had the rights and merits to commence proceedings in respect for the protection for her own property vis-á-vis herself.

H The next important point not to escape my attention is the question of specialized knowledge. In this regards, in my reading of the notes of proceedings again, I had noted that various legal arguments had been brought for the court's attention namely:

(i) the law of insurance,

(ii) the law of contract in relation to the interpretation of the insurance I clause,

(iii) the law of torts on vicarious liability,

(iv) the law relating to property and rights of spouses.

These well fall within specialized skills as well. I cannot agree more that the suit filed by the plaintiff had succeeded because the area of law in relation to insurance clause, principles of vicarious liability and rights of spouses had been properly expounded and implored upon. A

Therefore, I rule that this is one of the circumstances in a review of taxation in which it would be justifiable to increase the cost previously awarded.

I accordingly order a review and increase of the getting up to RM200,000 and dismiss the defendant's application for review accordingly. And also dismissed is the plaintiff's application for cost of this review which is RM10,000. B

Court: Getting up cost increased to RM200,000
Defendant's review dismissed.
Cost of review dismissed.
Order accordingly. C

- sgd -
DEPUTY REGISTRAR
HIGH COURT
JOHOR BAHRU D

From his ruling aforesaid it becomes patently clear that the learned deputy registrar had at the forefront of his mind the applicable factors of the skill and specialized knowledge required of counsel the perusal and study of crucial documents and the importance of the subject matter to the respondent in arriving at his decision and the enhancement of the item of getting up. E

I have scrutinized the submission of learned counsel for the appellant and regretfully no reference was made to the learned deputy registrar's ruling which failure to address must only lead to the conclusion that the appellant has failed to discharge the onus of proving that the learned deputy registrar exercised his discretion capriciously or mischievously to warrant my interference. The challenge as to the quantum of the amount awarded cannot be evidence of caprice or mischief just because it is disproportionate to the value of the subject matter. The answer to the challenge aforesaid as contended by respondent for which the court agrees, has been aptly answered by case law authorities particularly *MC Corbett* in that 'the opinion of the registrar is what the law provides shall count'. The Supreme Court in *Gooi Hock Seng v Chuah Guat Khim, Pemegang harta pesaka bagi estet Chuah Teow Hock, simati* [2000] 3 AMR 3683 has sealed the position on whether the registrar's award on quantum can be interfered when it held at p 3684: F G H

> Bearing in mind the decisions in *Coon v Diamond Tread Co (1938) Ltd* (1950) AELR Vol 2 385 and *Gorfin v Odhams Press Ltd* [1958] 1 WLR 314 and having considered what was laid down in the *Malaysian Court Practice, High Court* Vol 1, p 3941, the respondent's application for review of the first and third items ought to be dismissed. The phrase 'as the circumstances require' in O 59 r 36(5), confers on the judge a discretion which is to be judicially exercised. The registrar's decision should not be interfered with unless there was an error of principle or some other material error and for this purpose, a broad overview of the matter should be taken. The court will not interfere with I

A the decision of the taxing registrar upon a mere question of quantum if the taxing registrar has exercised his discretion after consideration of all the circumstances and if no question of principle arises. It is only when the taxing registrar's decision has been exercised on some wrong principle or the quantum allowed is obviously wrong that the judge will interfere.

B Hence having seriously considered his ruling I am of the view that the learned deputy registrar neither acted on any mistaken principle nor exercised his discretion capriciously or mischievously, but conversely, considered all relevant principles and facts to arrive at the quantum that he awarded.

C *The principles applicable in taxing costs*

The applicable principles in taxing costs in the High Court is encapsulated in O 59 Appendix 1 Part X, para 1(2) of the RHC which states:

> In exercising his discretion under this paragraph or under rule 31(2) in relation to any item, the Registrar shall have regard to all relevant
D circumstances, and in particular to —
>
> (a) the complexity of the item or of the cause or matter in which it arises and the difficulty or novelty of the questions involved;
>
> (b) the skill, specialised knowledge and responsibility required of, and the time and labour expended by, the solicitor or counsel;
>
E (c) the number and importance of the documents (however brief) prepared or perused;
>
> (d) the place and circumstances in which the business involved is transacted;
>
> (e) the importance of the cause or matter to the client;
>
> (f) where money or property is involved, its amount or value;
>
F (g) any other fees and allowances payable to the solicitor or counsel in respect of other items in the same cause or matter, but only where work done in relation to those items has reduced the work which would otherwise have been necessary in relation to the item in question.

In approaching the principles to be applied in taxation of costs the court must not be oblivious to the legal principle that costs do not form part of
G damages recovered in a particular case. As was stated in the case of *Sadiah Ismail v Ong Suan & Anor* [1999] 5 CLJ 250, by Azhar Ma'ah J at p 252:

> ... costs come as of right and it is not to be considered as part and parcel of the damages awardable in respect of the injuries ... .'

H The other guiding principle is that the court should not be oblivious of is that costs cannot be taxed in proportion to the damages recovered in a case or as a percentage of the damages awarded. This principle was recognized by KC Vohrah J (as his Lordship then was) in the case of *Ketua Pengarah Hasil Dalam Negeri v Damansara Jaya Sdn Bhd* [1999] 2 MLJ 374 where he held at p 382:

I

> Counsel for the company had pointed out that the amount involved in the dispute is a large amount. It has to be noted that, the SAR did give recognition to this fact, but it is again of one of the circumstances which he took into

> account. The point of law as pointed out by the SAR was not a novel one but it did require specialized knowledge. It would be wrong to unduly inflate a getting-up fee by tying it to a formula which involves a certain percentage or proportion of the amount in dispute or quantum awarded.

The guiding principle aforesaid essentially means that if a case involves a dispute over RM100m, the costs awarded to the successful party cannot be calculated as say 5% of the sum in dispute which would be RM5m! The principle, however, does not end just there. The principle must also, as a matter of course, conversely mean that if the sum in dispute is small, the costs awarded need not necessarily be minimal. To illustrate an example, if an appeal is made to the High Court against the decision of a magistrate where the sum involved is only RM11,000, this does not mean that the costs allowed for the appeal in the High Court should only be restricted to say 5% or 10% of the claim awarded.

This is so because taxation of costs does not solely depend on the quantum of the claim or the amount of damages recovered in a particular case. The sum involved is only a factor which has to be taken into consideration with other factors as encapsulated in O 59 Appendix 1 Part X, para 1(2) of the RHC.

In this connection the decision of VC George J (as his Lordship then was) in the case of *Canopee Investment Pte Ltd & Ors v Landmarks Holdings Bhd & Ors* [1990] 1 MLJ 292 cited by the appellant to support their contention that only minimal costs should be allowed calls for a close scrutiny. In that case, the learned judge opined at p 293:

> A starting point in considering the exercise of discretion by a taxing officer particularly in respect of the item 'getting-up' could be the fixed scale of costs set out in O 48 r 12 of the Subordinate Courts Rules 1980. The fixed cost in the scale is *in proportion to the quantum of the subject matter of the action.* ...
>
> ...
>
> Now, for purposes of taxation of costs *running down actions could be considered to be the simplest of cases.* It should attract for getting-up about the amount arrived at by applying the Subordinate Courts Rules 1980 scale. (Emphasis added.)

An analysis of the decision would undoubtedly reveal that, VC George J in *Canopee Investment* made two generalizations in arriving at the decision.

Firstly, he ruled that the registrar in exercising his discretion in taxing costs should, as a starting point, consider the fixed scale of costs under O 48 r 12 of the Subordinate Courts Rules 1980. This conclusion in my view and with the utmost of respect to the learned judge is totally erroneous, flawed and unfounded and I say so for the following reasons:

(1) the principles applicable in the process of taxation for a matter conducted in the High Court is enshrined in O 59 Appendix 1 Part X, para 1(2) of the RHC and not in the Subordinate Courts Rules 1980. It is patently clear that the Subordinate Courts Rules cannot be applied for matters conducted in the High Court. If the intention of the Rules Committee was for the taxing officer to have regard to the fixed scale of costs provided for cases handled in the subordinate

courts, they could very well have expressly stated so in O 59. In the absence of any such expression of the Rules Committee's intention, the court cannot of its own motion re-write the legal position and propound that the lower courts scale should be considered when taxing the costs for a superior court matter;

(2) the RHC gives the taxing officer a discretion when fixing costs for a matter, which is unlike the Subordinate Courts Rules 1980 which provides a fixed scale that must be followed by the registrar of the subordinate courts. From this, it becomes abundantly clear that the RHC and the Subordinate Courts Rules are entirely dissimilar and inconsistent in that the former does not provide a fixed scale of costs to be awarded for pursuing a claim. If the taxing officer is required to commence the process of taxation with reference to the fixed scale of costs in the Subordinate Courts Rules, the inevitable result would be that the registrar of the High Court loses the discretion granted to the taxing officer by the RHC; and

(3) the taxation of costs in the High Court does not corelate to the amount in dispute or the amount of damages awarded as decided in the cases of *Ketua Pengarah Hasil Dalam Negeri v Damansara Jaya Sdn Bhd* and *Pang Kok v Leong Fock Hap & Anor* [1996] 4 MLJ 97. The fixed scale provided for by the Subordinate Courts Rules, conversely, is directly proportional to the size of the claim. VC George J himself, in addressing the scale of costs in the Subordinate Courts Rules, states that it is 'in proportion to the quantum of the subject matter of the action'. This evidently is contrary to the principles of taxation applied when taxing matters are conducted in the High Court.

The second generalization by VC George J which again in my view is unfounded relates to his conclusion that accident cases are the simplest of cases and are run of the mill matters, and that consequently, the fixed scale of costs provided for the lower courts can be used when taxing the costs to be awarded for accident matters conducted in a superior court. The learned judge did not cite any authority or give any reasons for his conclusion that accident cases are simple, run of the mill matters. The question thus arises whether this conclusion is true and are all accident cases simple and easy, not involving any complex or new issues?

The courts must be conscious that sweeping statements are precarious for they do not take into account the fact that each case must be considered on its own facts and the issues of law it raises. Undoubtedly, the court cannot with confidence conclude generally that all accident cases involve the same issues of law and facts.

Hence, the conclusions made by VC George J must be treated with the utmost of caution and as stated above cannot be accepted and applied in the process of taxation of costs in the High Court. The caution becomes more evident as in a subsequent case, *JP Finance (M) Bhd v Tanswan Brothers Enterprise Sdn Bhd & Ors* [1994] 1 MLJ 47, VC George J himself qualified his own conclusion where on pp 53–54 he stated:

> Now, in *Canopee Investment Pte Ltd & Ors v Landmarks Holdings Bhd & Ors* [1990] 1 MLJ 292 (refd) *I had suggested* that taxing officers could get some guidance from the rules committee's views on the quantum to be awarded. ... *I pause to note that there are some qualifications I should have made to what was suggested in Canopee Investment Pte Ltd & Ors v Landmarks Holdings Bhd & Ors* [1990] 1 MLJ 292 (refd) (*and did not*). (Emphasis added.)

The learned judge went on to say at p 54:

> ... *the rates and figures suggested ... are not necessarily those that the taxing officer should use or apply.*
>
> ...
>
> *I pause to express the hope that if and when Canopee Investment Pte Ltd & Ors v Landmarks Holdings Bhd & Ors* [1990] 1 MLJ 292 (refd) *is cited, reference to these clarifications will not be overlooked.* (Emphasis added.)

Thus, it is clear from his subsequent decision the learned judge had changed his mind on the correctness of the principles he propounded in his earlier decision in *Canopee Investment*. The learned judge only stopped short of saying that the earlier decision he made was wrong, but that can easily be surmised from his subsequent decision in *JP Finance*. It is also important to note at this point that the 'principles' in *Canopee Investment* have never been applied or cited with approval in other cases involving taxation of costs.

Hence, it becomes undoubtedly clear that only the several factors encapsulated in O 59 that has to be taken into consideration in a taxation of bill of costs within the province of the High Court and it behoves upon me to elucidate on its applicability to the factual matrix herein.

A consideration of the principles in O 59

The First Principle — O 59 Appendix 1 Part X, para 1(2)(a)

This principle deals with the complexity of the cause or matter and the difficulty or novelty of the questions involved. Does this case involve complex, difficult and novel issues? The riposte to that question is at the expense of repetition found in Abdul Malik Ishak J's judgment in this case where he says:

> I am told that *I am breaking new ground* as my decision, if I am with the wife, would prevent the insurance company from insisting that a passenger liability cover be taken to cover the wife who is being carried in the husband's (policyholder's) motor car which was driven by her son as the authorized driver even though the policy is sufficiently worded to cover such an exigency. (Emphasis added.)

The complexity and novelty of the issues involved in this case cannot be denied in the light of the observations by Abdul Malik Ishak J himself in his grounds of judgment that this case involved new and novel issues of law. Furthermore from the notes of evidence it would appear that the hearing of this matter went on over a period of two days, that is from 11 September 1995 to 12 September 1995.

Moreover, the Court of Appeal granted leave to appeal against the High Court's decision. It is trite in law that leave to appeal to the Court of Appeal or the Federal Court will only be granted if the case involves new issues of law that are of general public importance as decided by the High Court in the case of *Pang Hon Chin v Nahar Singh* [1986] 2 MLJ 145. This legal position was approved by the Court of Appeal in *United Oriental Assurance Sdn Bhd v Penang Medical Centre Sdn Bhd* [1999] 2 MLJ 542 and by the Federal Court in the case of *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors and another application* [1999] 1 MLJ 257.

The Second Principle — O 59 Appendix 1 Part X, para 1(2)(b)

The second principle is the skill, specialized knowledge and responsibility required of, and time and labour expended by, the solicitor or counsel.

In deciding the second principle it must be put in perspective that this case is not an accident case involving the issue of damages payable for loss of ability or for injuries sustained. This is a case of enforcement against an insurance company under s 96 of the Road Transport Act 1987 and involved issues relating to the law of insurance. This case also involved the interpretation of contract and the applicable principles when interpreting the terms of a contract. This case, apart from that, involved the issue of vicarious liability of a husband for a tort committed by his son and the inter-spouse issue under s 9 of the Married Women Ordinance.

The above issues surely are issues that require skill and specialized knowledge of the law of insurance, the law of contract, the law of torts and the law relating to the proprietary and other rights of spouses.

The Third Principle — O 59 Appendix 1 Part X, para 1(2)(c)

The third principle is the importance of documents (however brief) prepared or perused.

It cannot be denied that the most important document perused in this case was the insurance policy issued by the appellant's company. As such the respondent's solicitors must invariably be compelled to peruse and study the said document with great care before being able to advise the respondent of her sustainable cause of action against the appellant under cl 1(a) s II and cl 9 Endorsement D of the insurance policy. In addition it cannot be said that the respondent's solicitors were not required to peruse the record of appeal, grounds of judgment and the notes of evidence of the trial court.

The Fourth Principle — O 59 Appendix 1 Part X, para 1(2)(e)

This principle is the importance of the cause or matter to the client. On the factual matrix herein the importance of the matter to the respondent is self evident as it involves a claim for loss of income (ie her livelihood) and damages for injuries sustained as a result of the accident. This is not a

matter that can be dismissed lightly, as the Federal Court rightly observed in the case of *Bar Council v Datuk V Kanagalingam* [2000] 3 CLJ 697 where the Chief Judge of Sabah and Sarawak Chong Siew Fai ordered the payment of a sum of RM120,000 as costs. In his Lordship's grounds of judgment, the Right Honourable Chief Judge held:

> In contrast to the contention of the appellant that this was just a case involving simple issues with no difficult points of law requiring special skills involved, *I consider it a matter of considerable importance in that the livelihood ... of the respondent was in jeopardy.* ... On the same reckoning, *I could not be persuaded to treat the question of costs awarded as if it were only ordinary costs given in a summary judgment application.* (Emphasis added.)

On the quantum awarded by the learned deputy registrar an insight into previous awards as decided by case law authorities would be of invaluable guidance.

In *United Malayan Banking Corp v Syarikat Perumahan Luas Sdn Bhd* [1991] 3 MLJ 181, the court allowed a sum of RM65,658.45 as costs for resisting the foreclosure proceedings of a piece of property that was charged to the bank as security for repayment of a loan upon application by the chargor to set aside the order for sale.

In *Vincent Cheng Kim Chuan v The Minister for Home Affairs & 2 Ors* [1992] 2 CLJ 945 which relates to an originating motion for a writ of habeas corpus the Singapore Court ruled that a sum of S$65,000 (equivalent to approximately RM130,000) was a fair and reasonable amount to be allowed for getting up.

In *United Malayan Banking Corporation Berhad v Indah Sejati Sdn Bhd* [1992] 1 AMR 41 which relates to an uncontested foreclosure proceedings, the senior assistant registrar allowed a sum of RM15,000 for getting up. On appeal to the judge for review of the registrar's order, James Foong J held that the case was not complex and did not involve any new or novel issues. Nevertheless, the learned judge increased the cost of getting up from RM15,000 to RM30,000.

Phua Lay Chay v Chai Kuan Way [1988] 3 MLJ xxv involved an accident case that was settled amicably. Nevertheless, the Singapore Court allowed a sum of S$19,000 (equivalent to approximately RM41,000) as costs.

Tuan Hj Ishak bin Ismail v Leong Hup Holdings Bhd & other actions [1997] 1 MLJ 623 which relates to an appeal in the Court of Appeal against a decision of the High Court striking out the statement of claim under O 18 r 19(1)(a), (b) and (c) of the RHC, the Court of Appeal ordered a sum of RM100,000 to be paid as costs.

It must be emphasized that *Tuan Hj Ishak bin Ismail* was utterly devoid of new or difficult issues as it relates to a striking out action where a search in the Current Law Journal would reveal not less than 525 cases on striking out under O 18 r 19(1). Nevertheless, the Court of Appeal allowed a sum of RM100,000 for getting up. In fact, the learned judge of the Court of Appeal, Mahadev Shankar JCA himself observed at p 627:

A The appeals were *confined to one issue only*: Did the petition on its face disclose a cause of action? (Emphasis added.)

Be that as it may, the court was of the view that a fair and reasonable sum for getting up was RM100,000.

In *Bar Council v Datuk V Kanagalingam* which involves an appeal to the B Federal Court against the decision of the Solicitors Disciplinary Board where although there was no determination of any new or novel issue, the Chief Judge of Sabah and Sarawak allowed a sum of RM120,000 as costs as it involved the respondent's livelihood.

Finally as reported in the 20 March 2002 issue of the *New Straits Times* C the High Court costs totalling more than RM200,000 to the Kelantan Succession Council and the Kelantan State Government against the businessman who sought a declaration that he was the rightful heir to the Kelantan throne.

The getting up costs sought in this case

D In this case the respondent in their item for getting up sought costs of RM300,000 for getting up. The amount sought is as I have related above is based on the following irrefutable facts:

(1) this case involved complex, difficult, new and novel issues;

E (2) this case required specialized skill and knowledge of various areas of the law;

(3) this case involved the interpretation of an important document, that is the insurance policy. Now, we cannot accentuate enough the importance of that policy document — it was one that was generally used by the insurance industry in Malaysia. The judgment in this case F has the effect of compelling the entire insurance industry to re-write their insurance policies. The far-reaching effects of this case is evident from the fact that the Malaysian Insurance Association appointed its own counsel to hold a watching brief when the appeal was being dealt with by the Court of Appeal; and

G (4) this case involved a matter of great importance to an individual, that is the source of income. It cannot be denied that this case was certainly of great magnitude to the respondent who lost her source of income as a result. Furthermore the court cannot to be oblivious to the fact that the respondent had to wait some 12 years before obtaining final judgment (due to the continuous appeals by the appellant) before H eventually recovering the income she had lost. Her difficulties during that interim period are something that one cannot imagine to fathom.

A careful study of the seven cases adverted above reveals that it involved one (1) of the seven (7) factors to be considered under O 59 Appendix 1 Part X, para 1(2) of the RHC. In fact in some of those cases, none of the principles I were applicable.

To illustrate the point in the case of *United Malayan Banking Corp v Syarikat Perumahan Luas Sdn Bhd*, only the first principle was applicable,

that is the complexity of the matter. Even so, that case was still not considered as one involving new or novel issues.

Again in the case of *Vincent Cheng Kim Chuan v The Minister for Home Affairs & 2 Ors*, the case involved only the interpretation of the principles in one (1) authority only (ie one case law only) and was neither complex nor involved new and novel issues.

Further, in the case of *United Malayan Banking Corporation Berhad v Indah Sejati Sdn Bhd*, James Foong J himself remarked that the case before his Lordship did not involve any new or novel issue, neither was it one that was complex nor difficult.

In the case of *Phua Lay Chay v Chai Kuan Way* that did not even have a trial, there were no issues that had to be considered by the court as a result thereof and since the matter had been amicably settled.

In the Court of Appeal case of *Tuan Hj Ishak bin Ismail v Leong Hup Holdings Bhd & other actions*, there was only one (1) issue before the court and that too not a novel one.

Finally, the Federal Court case of *Bar Council v Datuk V Kanagalingam*, only the fourth principle was applicable there, that is, the importance of the cause or matter to the client. Even in the recent suit for a declaration in Kelantan, the case only involved an issue of public importance (which this case also did for reasons as I have already stated).

The learned deputy registrar awarded a sum of RM200,000 as costs on account of the fact, inter alia, that this case involved a new and novel issue of law that has far-reaching implications for the insurance industry in Malaysia. He also gave due weight to other factors that are at play in this case and as succinctly stated are:

(1) the fact that this case required great skill and specialized knowledge of counsel;

(2) this matter involved the perusal and study of crucial documents; and

(3) this cause was highly important to the client.

The learned deputy registrar considered the above circumstances and also the fact that the court had the benefit of submissions and extensive research by an eminent and senior counsel at the Bar. In *Perry and another v Lord Chancellor* The Times, 26 May 1994, Transcript, Garland J examined the principles thus:

> Mr Newman then referred to an earlier decision of Master Prince in April 1990 *R v Williams* [Case 881760] in which counsel claimed for 'legal research' in a complex case ... The Master said:
>
> > *'In counsel's taxation note he refers to the time spent on legal research. He does not allocate a time spent on it, but he refers to consulting Archbold, Halsbury's Statutes, Halsbury's Laws, two books ... and many authorities. Counsel's remuneration takes into consideration the fact that he is competent to deal with cases in which he is instructed and for being learned in the law. He is entitled of course to remuneration for applying the law to the facts of the case. ...'*

... Master Rogers said:

> 'Competent junior counsel must clearly be expected to, and would have, a general knowledge of the basic essentials of criminal law such as the definition of theft and clearly could not expect to be nor would claim to be remunerated for looking that up. *However, where a new or changing field of law has to be considered ... then clearly counsel must do research into that aspect and that cannot be considered part of his 'stock in trade'.* ...

In both *R v Reubens* and *R v Sabaroche*, reference was made to *R v Legal Aid Board ex parte Bruce* [1992] 1 All ER 133, [1991] 1 WLR 1231 and a passage in the judgment of the former Master of the Rolls at p 1237 where he said:

> 'Solicitors, like barristers and judges, are not expected to carry a knowledge of all the law in their heads. They have to consider rules, regulations, textbooks and authorities or get others to undertake research for them. If the problem is difficult or outside the scope of their experience, they will wish to discuss it with others who are more qualified (whether professionally or otherwise) and in some circumstances may have to remunerate those whom they consult. ... (Emphasis added.)

The extent of research done by counsel and his experience at the Bar are pertinent factors to be considered in taxation. This is evident from the dictum in the above case. The court should also take into account inflation when considering the appropriate sum to be awarded for getting up. Hence having regard to all these factors, the learned deputy registrar cannot be said to have not exercised his discretion properly having regard to the applicable principles.

As I have stated above there is no evidence whatsoever that the learned deputy registrar exercised his discretion on a mistaken principle or capriciously or mischievously. There is nothing in the grounds of decision or ruling handed down by the learned deputy registrar that shows that mistaken principles were applied during the review before him. On the contrary, a reading of his ruling clearly and unequivocally shows that he considered the principles laid down in O 59 Appendix I Part X, para 1(2) of the RHC.

Conclusion

One of the most difficult and unenviable tasks in taxation of costs is to determine a figure for getting up and it is only appropriate for all those involved in such a task to be reminded of the sage advice of Justice Donaldson in *Property and Reversionary Investment Corporation Ltd v Secretary of State for the Environment* [1975] 2 All ER 436 where his Lordship adviced at p 443:

> Each case will always have to be considered on its merits ... . various figures will no doubt come to mind. They can be tested relative to the remuneration generally accepted, or previously held to be fair and reasonable in comparable transaction, due allowance being made for all distinctions ... . in the end it is a value judgment, based on discretion and experience. We have had to make a value judgment. Our figure may not be the right figure, and indeed such a figure probably does not exist, but we hope that it will be a right figure — *one which is reasonable in all the circumstances.* (Emphasis added.)

At the point of repeating myself, I must stress that there is no evidence whatsoever that the figure awarded by the learned deputy registrar in this case is the wrong figure; indeed for the reasons advanced earlier, it is the right figure and hence is reasonable in all the circumstances of this case.

In the circumstances the appellant's application for review is accordingly dismissed.

In addition by reason of the extensive research and analytical arguments presented by the respective counsel herein, principally by the respondent's counsel, as evidenced by the several written submissions and voluminous bundle of authorities it is only appropriate that costs be awarded for the review herein which in the circumstances of the case, a fair figure of RM5,000 is accordingly awarded to the respondent.

Appellant's application dismissed.

Reported by Lim Lee Na